UNITED STATES
v.
ESTELLA M. KINCANON AND DAVID L. KINCANON

IBLA 72-325 Decided September 26, 1973

Appeal from a decision of Administrative Law Judge L. K. Luoma in contest A-2201 declaring the Kincanon No. 1 placer mining claim to be valid.

Affirmed in part, set aside in part and remanded.

Mining Claims: Location ! ! Mining Claims: Generally

Where there is a variance or discrepancy between the location notice or certificate and the stakes or monuments on the ground, the latter will prevail and are more certain evidence of the exact situs of the claim.

Mining Claims: Location ! ! Mining Claims: Generally

The purpose of an amended location notice is to cure imperfections and correct errors. In the absence of intervening rights the amendment relates back to the date of original location.

Mining Claims: Common Varieties of Minerals: Generally ! ! Mining Claims: Determination of Validity ! ! Mining Claims: Discovery: Marketability

To satisfy the requirements for discovery on a mining claim located for a common variety of stone prior to July 23, 1955, it must be shown that the exposed material could have been extracted, removed

and marketed at a profit on that date, and further that the market for the material from the claim has continued without substantial interruption to the present time.

APPEARANCES: Richard L. Fowler, Esq., Office of the General Counsel, U.S. Department of Agriculture, Albuquerque, New Mexico, for the Forest Service; Hale C. Tognoni, Esq., of Tognoni & Pugh, Phoenix, Arizona, for contestees.

OPINION BY MRS. LEWIS

The Forest Service has appealed from the Administrative Law Judge's decision of March 7, 1972, declaring the Kincanon No. 1 placer mining claim to be valid. 1/

The contestees filed a patent application for the above!named mining claim. Upon completion of an examination of the claim by the United States Forest Service and at its request, the Bureau of Land Management, Department of the Interior, issued a contest complaint on August 11, 1969, charging that a valid discovery as required by the mining laws does not exist within the limits of the claim; that the mineral material found within the limits of the claim is not a valuable mineral deposit under 30 U.S.C. § 611 (1970); that the land embraced within the limits of the claim is nonmineral in character; and that portions of the claim were included after July 23, 1955, by amendments dated August 11 and October 19, 1966, at a time when the additional land was not open to mineral entry for the mineral materials found thereon. The mining claimants denied the charges. Thereupon, a hearing was held on March 15 through 17, 1971, at Flagstaff, Arizona.

Appellant!contestant's principal reasons for appeal are:

1. None of the developed pit falls within the boundaries of the claim as it existed between May 18, 1943, and August 11, 1966.

2. The mineral material removed from the pit is a common variety not subject to location after July 23, 1955.

1/ The title of "Hearing Examiner" was changed to "Administrative Law Judge," 37 F.R. 16787, 38 F.R. 10939-40.

3. The claim should be declared to be null and void since the requirements of the mining law were not met.

In regard to the boundaries of the claim and the rock pit area, the decision of the Judge states:

Claim Boundaries

According to the county records, the claim was located by Roy E. Kincanon (deceased, husband and father of Contestees), on May 18, 1943. Amended location notices were filed by Contestees on August 11 and October 19, 1966, for the purpose of correcting errors in the description contained in the original location notice (Ex. D). The description contained in the latest amendment conforms substantially to Mineral Survey No. 4652, Arizona, approved February 19, 1968, upon which the application for patent is based (Ex. 1).

The mineral claimed is a rock deposit suitable as a source of crushed rock and aggregate for the manufacture of concrete. Over the years, Contestees and their predecessors in interest, and their licensees, have produced a substantial amount of crushed rock and aggregate, creating a sizeable pit in the foot of the mountain (Exs. 10 and 11).

It is the contention of Contestant that the amended location notice takes in a substantial amount of ground not covered by the original location and that none of the developed pit area falls within the boundaries of the original location. This contention is based upon a tracement of the metes and bounds description contained in the original location notice, and a superimposition of that tracement over the mineral survey (Exs. A and F). The end result of this contention is that the ground actually developed as a quarry site was not located until 1966, thereby raising the issue of whether the material is a common or uncommon variety under Public Law 167 (30 U.S.C. § 611).

The evidence does not support this contention. To begin with, the metes and bounds description in the original location notice is faulty because it does not

close, and requires interpretation to form a tracement (Tr. 99-100). The surveyor who ran the line in 1943 testified that the claim area as originally laid out and monumented by Mr. Kincanon took in the existing pit area and substantially accords with the area embraced by the Mineral Survey 4652 (Ex. 7; Tr. 343-357). Similar testimony was given by Mr. Kincanon's co ! locator and silent partner (Tr. 16; Ex. 17), by the original developer of the pit (Tr. 230-231), and by Contestee Mrs. Kincanon (Tr. 364-375).

Accordingly, it is found and concluded that the area embraced by Mineral Survey 4652 conforms to the area monumented and claimed by the original locator in 1943, and that Contestees hold possession of the claim by virtue of the original location notice as amended. Even absent the original claim notice, the evidence would support a finding that Contestees' possession is established under the provisions of 30 U.S.C. § 38 (1970).

We agree with the Judge that the description in the 1943 recorded location notice is faulty. But his reason that it "is faulty because it does not close" is irrelevant. Mr. Etter, the surveyor who ran the lines in 1943 for the location notice description, testified that he did not measure from corner 3 to corner 2, a line on the north side, which testimony corrected, as contestant admits, the mistaken belief of the Forest Service mineral examiner, an earlier witness, that the surveyor for the 1943 description did not run a line from corner 7 to corner 1, a line on the south boundary.

Contestant's Exhibit F is a copy of the plat of Mineral Survey 4652 upon which the Forest Service mineral examiner has superimposed, inter alia, the 1943 location notice description reflecting that the pit area from which rock was removed is south of the southern boundary line of the 1943 description.

Where there is a variance or discrepancy between the location notice or certificate and the stakes or monuments on the ground, the latter will prevail and are more certain evidence of the exact situs of the claim. Southern Pacific Railroad Company, 50 L.D. 577, 578-579 (1924). The purpose of an amended location notice is to cure imperfections and correct errors, which in the absence of intervening rights relates back to the date of location. Fred B. Ortman, 52 L.D. 467, 471 (1928).

For resolution of the matter of the situs of the claim on the ground and the rock pit area, we turn to the testimony adduced at the hearing.

Mr. Etter, the surveyor who ran the lines in 1943, testified. "* * * we actually went around this other way with our survey," meaning counterclockwise. Then he added, "but when we make a description we go clockwise * * *." He stated that he only measured between the corners set by Roy Kincanon, the locator. He took needle readings on his transit and others did the chaining. He related that it was not a really accurate survey (Tr. 346-348). On cross!examination of Etter, there was the following exchange (Tr. 352):

> Q. Now, your south line of the claim, did it go south of the pit on the south end of the hill?
>
> A. Well, there was no pit there at that time, but there was a bluff, and it went south of that bluff, and that bluff, I think, is what is now the pit.
>
> Q. And so your south line did go south of the rock?
>
> A. Right against the rock.

At the request of the Judge, Etter placed a red dashed line on Exhibit 10, a photograph of the hill and pit, which indicated that the south line of the claim embraces the pit area developed into the hill (Tr. 356-357).

Wren, a co!locator and silent partner of Roy Kincanon, testified that in 1938 he found the rock outcrop in a hill and spoke to Roy Kincanon about locating it as a rock pit. He and Kincanon in 1938 monumented four corners with rocks and placed a location notice in a tobacco can at each corner. (Apparently that location notice was never recorded.) He identified the general area of the claim by reference to existing roads and with the aid of a rough sketch (Exh. 17) he had drawn, which was not to scale and not tied to a public land survey corner. His sketch portrays the hill as being within the claim boundaries. When shown Exhibit 10 (photograph), he stated that this is the hill they intended to take into this claim. He remarked that it shows considerable excavation at the pit from which material was removed by various licensees. He further testified that previous to the hearing he had not seen a copy of the 1943 loca!

tion notice recorded by Roy Kincanon, although he was present when Etter made his survey of the claim. When asked to compare his rough sketch of the claim with the mineral survey plat for the Kincanon No. 1 placer claim, he stated they were "close" (Tr. 11-16).

Del W. Fisher, owner of two patented mining claims adjacent to the west of the Kincanon claim, and the contractor who was the original developer of the Kincanon No. 1 claim testified that he is familiar with the Kincanon claim from 1943 when, by agreement with Roy Kincanon, he removed and used rock from the Kincanon claim. He stated that the Kincanon claim covered generally the side of the hill and the markers he believes were pointed out to him, but he would not be able after all that time to identify exactly where they are. He explained his inability to describe the monuments as other than piles of rock, because he had observed them from an automobile from the road. With his attention directed to Exhibit F (survey plat) and Exhibit 10 (photograph), he stated that this definitely is the area. He recalled going up a road in 1943 with Roy Kincanon who pointed out a rock monument in the vicinity of corner No. 4 of the mineral survey plat and a monument 50 feet to the right of the road at corner No. 2, which would be contiguous to his own claims. He also testified that, under a second contract in 1946 with Kincanon, at the place of Exhibit F designated "rock pit," he made the original excavation at that point. He added to the exhibit a red circle enclosing "F 1946" at the approximate point. He knew the claim took in the point of the hill and the claim went back to approximately where his claims are.

Orville Pendergrass, owner of two unpatented placer claims for sand adjacent to the south of the Kincanon No. 1 claim, known as the Collins Nos. 1 and 2 placer claims, which he purchased in 1947, testified he is acquainted with the Kincanon claim. He based this on the fact that he had been on his claims almost daily from 1947 until 1960, when he retired from his contracting and sand and gravel business. He stated that the south boundary of the Kincanon claim and the north boundary of his claims are supposed to be a common boundary line. In 1947, he found or saw the two corner monuments that were on the south of the Kincanon claim which bounded his property. These rock monuments with painted posts were destroyed a year or two later by trucks and bulldozers operating on the Kincanon claim. From his observation on the ground, he was of the opinion that the corners set by the mineral surveyor and shown on Mineral Survey 4652 as a common boundary between his claims and the

Kincanon claim are correct. As far as he knew, the toe of the rock bluff or hill was on the Kincanon claim; the toe of the bluff is about 250 feet north of the road that runs east to west on his claims, and what he considered to be the Kincanon claim line is 30 or 40 feet north of the road.

Mrs. Estella M. Kincanon, a contestee, testified that her deceased husband in 1943 had pointed out to her on the ground the corners of the Kincanon No. 1 placer claim. She related how she engaged the mineral surveyor and showed him the corners 1, 2 and 4 of the claim and described to him where he would find corner No. 3. Subsequent to the mineral survey she went on the claim with the mineral surveyor to observe where he had placed the claim corners. She stated that corner No. 1 was placed about 25 feet west of and inside the claim point she had shown him, that corner No. 2 was right on the point where her husband had shown her, that corner No. 4 was 5 feet off, but within the point of the claim she had shown to the surveyor, and that on another day, when she could get up the hill, she visited corner No. 3 and was satisfied that it was placed "within her ground." Mrs. Kincanon testified that the claim was intended to cover the mountain of rock on the south side and the mineral survey covers it.

In view of the foregoing testimony relating to the situs of the Kincanon No. 1 placer claim on the ground, we agree with the Judge's findings and conclusion that the area embraced by Mineral Survey 4652, which includes the rock pit area, "conforms to the area monumented and claimed by the original locator in 1943, that the contestees hold possession of the claim by virtue of the original location notice, as amended."

## Claim Validity

The rock on the Kincanon claim is described by various witnesses as a shale, a rhyodacite, and a felsite. The characteristics of the rock are said to be hardness and sharp edges on fracturing; it must be ripped or blasted, and it is easily crushed and sized. Its primary use has been as a coarse concrete aggregate suitable for concrete in highway construction. It also has been used in concrete for foundation, walls and roof of a water storage tank, and in bridge, manhole base, and gutter construction. Further uses were as aggregate base course, chat for asphalt sealing, oil cake seal for pavement, base for sewer plant clarifier, and chips for highways and driveways.

The principles of law applicable to this case are well established. For a mining claim to be valid a valuable mineral deposit must be discovered on the claim. A discovery exists

> * * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *. Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

This test, the prudent man rule, has been refined to require a showing that the mineral in question can be extracted, removed and marketed at a profit. United States v. Coleman, supra. This "marketability test" can be demonstrated in part by a favorable showing as to such factors as the accessibility of the deposit, bona fides in development, proximity to market, and the existence of a present demand. Palmer v. Dredge Corporation, 398 F.2d 791 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959). The Act of July 23, 1955, 30 U.S.C. § 611 (1970), withdrew common varieties of sand, stone and gravel from location under the mining laws. Therefore it is necessary for one who has located a claim prior to that date for a common variety of sand, stone and gravel to show that all the requirements for discovery, including that the materials could have been extracted, removed and marketed at a profit, had been met by that date, 2/ and thereafter. In this regard this Board has ruled in United States v. Charleston Stone Products, Inc., 9 IBLA 94, 100 (1973):

> * * * [I]t is clear that not only is a showing of marketability as of July 23, 1955, required, but that the contestee must also establish that in the interval from the date of withdrawal of common varieties * * * from mineral location to the date of contest proceedings a market for the common variety mineral has continued without any prolonged interruption. This requirement flows from the fact that if the marketability of the common variety mineral for which the claim was located is lost, the validity of the location is similarly lost and the claim may be declared null and void after contest proceedings. * * * Since the Act of July 23, 1955, supra, expressly removed common varieties of sand and gravel

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2/ Palmer v. Dredge Corporation, supra; United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285 (1971).

> from location under the mining laws, later recovery of a profitable market cannot serve to resuscitate such invalid claims.

Accordingly, where it is determined that the material on a mining claim is a common variety of stone and it is not shown that the requirements of discovery, including marketability, had been met on July 23, 1955, the claim is invalid. Also where it is shown that the requirements of discovery had been met on July 23, 1955, but thereafter to the date of contest proceedings it has not been shown that marketability of the common variety of stone was reasonably continuous, the claim is null and void.

On the other hand, where it is determined that the material on a mining claim is an uncommon variety of stone, the validity of the claim rests on whether the requirements of discovery, including marketability, were met as of the date of the contest proceedings.

As to the validity of the claim, the Judge's decision concluded "that the claim contains a deposit of valuable stone which has been marketed profitably since 1943, and which can reasonably be expected to be marketed profitably in the foreseeable future." The basis for this finding is outlined in the Judge's decision:

> 1. It lies approximately 20 miles north of Flagstaff, easily accessible by improved roads (Exs. 2, F).
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> 2. It presently contains a large deposit of stone which is suitable as a source of crushed rock and aggregate for the manufacture of concrete (Tr. 95, 119, 143 and 305).
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> 3. In the Flagstaff area deposits of such rock are rather rare (Tr. 119, 175, 295 and 299).
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> 4. A quarry for the production of such rock was opened up in 1943, and over the years has been developed into a sizeable pit (Tr. 15 and 226; Exs. 9, 10, 11, A and F).
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> 5. Production, sales and market information are as follows:

a. 1943 ! Estimated production of 20,000 cubic yards for which claimants received $ 1,200 in royalties (Tr. 17 and 232).

b. 1946 ! 15,552 tons at $ .10 per ton royalty (Tr. 233).

c. Late 1940's or early 1950's ! Estimated production of at least 20,000 tons with royalties at 6 to 10 cents per ton (Tr. 19, 30-31 and 112). Additional sales of $ 100.00 and $ 124.31 (Tr. 270, 273).

d. 1955-56 ! Sales of $ 375.00 and $ 612.75 (Ex. 9).

e. 1957-1959 ! Estimated production of over 22,000 tons with royalties of $ 6,725.44 (Tr. 20-21 and 186; Exs. 9 and 23).

f. The total production between 1943 and 1955 estimated to be between forty and fifty thousand tons (Tr. 23 and 120).

g. 1966 ! Lease calling for $ 5,000.00 in rental plus $ .35 per ton royalty (Exs. 9 and 22; Tr. 328). After three days of crushing, lessee was stopped by the Forest Service. Had this not occurred lessee would have produced approximately 150,000 tons (Tr. 169-174; Exs. 19-20).
These sales were of rock in place and none of the evidence indicates that claimant incurred costs in the production and sale of the rock.

We note at this point that the Judge's decision contains no determination whether the material on the Kincanon No. 1 placer is, in fact, a common variety of stone removed from the operation of the mining laws by the 1955 Act. In view of the implications heretofore stated, such a determination is necessary, because the Act of July 23, 1955, although it withdrew common varieties of sand, stone, and gravel from the operation of the mining laws, expressly provides that "'common varieties' does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *." (Emphasis added.)

The Department in United States v. U.S. Minerals Development Corporation, 75 I.D. 127, 134 (1968), interprets the 1955 Act as requiring an uncommon variety of sand, stone, etc., to meet two criteria: (1) that the deposit have a unique property, and (2) that the unique property give the deposit a distinct and special value. In order to determine whether a deposit of stone has a unique property which gives it a distinct and special value, there must be a comparison of the material under consideration with other deposits of similar materials. Therefore, it must be shown that the material under consideration has some property which gives it value for purposes for which other materials are not suited, or, if the material is to be used for the same purposes as other materials of common occurrence, that it possess some property which gives it a special value for such uses, which value is generally reflected by the fact that it commands a higher price in the market place. United States v. California Soylaid Products, 5 IBLA 179 (1972); United States v. Chartrand, 11 IBLA 194, 201 (1973).

It is apparent that other commonly available materials are used for the same purposes for which the material from this claim has been used, although the quality of the other material may not be as good for such purposes. There was great stress that the material for concrete aggregate having the properties of the rock on the Kincanon claim is scarce in the Flagstaff area. It has been held that a deposit of otherwise common sand and gravel in an area where assertedly good quality sand and gravel is scarce does not make it an "uncommon variety," as scarcity is not a unique property but is only an extrinsic factor. United States v. O'Callaghan, 8 IBLA 324 (1972); United States v. Stewart, 79 I.D. 27 (1972).

The testimony and evidence of the intermittent sales discloses the in!place prices paid for the material from this claim at the various times.
Unfortunately, the record does not contain evidence as to the in!place value before and after July 23, 1955, of other materials used for the same purposes, upon which a comparison may be made. Therefore, a further hearing is needed to receive evidence on the in!place value of other materials used for the same purposes before a final decision can be made as to whether the deposit of stone on the Kincanon claim is an uncommon variety as defined under the Act and the standard stated above.

From our careful review of the record made at the hearing, we are aware of the sporadic production and sales of rock from the claim. Several problems are posed in that regard despite the Judge's findings.

Specifically, while the Judge's decision, regarding production and sales, under Item 5(c) of his decision spans the period "Late 1940's to Early 1950's," we note the last sale in that period, according to the record, was made to Orville Pendergrass in December 1950 for rock chips used on driveways in lieu of cinders (Tr. 273-274).

Further, Item 5d of the decision below reads: "1955-1956 ! Sales of $ 375.00 and $ 612.75 (Ex. 9)." The exhibit from which this information was obtained states on page 3: "Some old income tax returns of Mr. Kincanon were found and show that he had $ 375.00 in revenue from the sale of stone in 1955 and $ 612.75 in 1956." Exhibit 2 at page 2, under Item (f) also contains the identical statement. The originals of these documents were indicated to be over the signatures of Estella M. and David L. Kincanon, mother and son, contestees. David Kincanon admitted he had never seen his father's tax returns (Tr. 207, 214). Mrs. Kincanon was not questioned specifically regarding the 1955 and 1956 sales referred to in Exhibits 2 and 9 (Tr. 226-227). The above raises many questions not answered in the present record. Did the 1955 sales take place before or after July 23, 1955? Did the stone, the source of that revenue, come from the claim in issue? What is the reason for lack of sales from December 1950 to 1955? Was there a market during that period? If not, and if the sales in 1955 occurred in whole or part prior to the critical date were they sufficient to establish marketability at a profit and the existence of a discovery as of July 23, 1955? Or did the 1955 sales take place after July 23, 1955? Therefore, at the further hearing additional evidence is needed to answer these questions before a determination can be made as to whether the requirements of discovery under the prudent man rule complemented by the marketability at a profit test had been met on July 23, 1955.

The next production and sales referred to are for the years 1957-1959. The present record is unclear whether there were actual production and sales in each of the years 1958 and 1959. Under the terms of the lease issued in August 1956, the rental was established as $ 1,200 a year plus 15 cents a ton (Exs. 9 and 23). Mr. Wren testified that in 1957, as his share, he received $ 3,362.72. He stated that in 1958 and 1959 only the yearly rental of $ 1,200 probably was paid, because the operators were not producing all the time (Tr. 32).

The next and last production and sales from the claim, according to the present record, were in 1966, when the lessee, after three days of operation, ceased at the request of the Forest Service.

The present record does not contain information from which a determination may be made that a market did or did not exist during the intervals of no production or sales. Therefore, the further hearing is also needed to receive evidence on the issue of whether there was an actual market for the material from this claim during such periods and, if there was a market, the reasons, if any, for the mineral claimants' failure to capture a portion of that market.

In summary, we affirm the finding of the Judge with respect to claim boundaries, and we find that a further hearing shall be held to receive evidence relating to the issues of marketability at a profit as of July 23, 1955, and thereafter to the present, and whether the rock is a common variety.

Following the further hearing, the Administrative Law Judge shall make findings on the issues of common variety, marketability, and discovery.

Accordingly, that portion of the decision appealed from which validates the Kincanon No. 1 placer mining claim and orders a patent to issue is set aside.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, set aside in part, and the case is remanded to the Hearings Branch at Salt Lake City, Utah, for further evidentiary proceedings consistent with this decision.

Anne Poindexter Lewis
Member

I concur:

Frederick Fishman
Member

I concur in the remand:

Joan B. Thompson
Member